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No. 87-1767

# In The Supreme Court of the United States

OCTOBER TERM, 1987

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TYLER PIPE INDUSTRIES, INC.

*Appellant*

v.

STATE OF WASHINGTON DEPARTMENT OF REVENUE,

*Appellee*

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**On Appeal from the Supreme Court of Washington**

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## REPLY TO MOTION TO DISMISS OR AFFIRM

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## REPLY TO MOTION TO DISMISS OR AFFIRM

### I.

### TO SHORE UP THE ILLUSORY ARGUMENTS OF THE WASHINGTON SUPREME COURT, THE STATE OF WASHINGTON DISTORTS THIS COURT'S RULINGS, THEREBY EMPHASIZING THE UNSUPPORTED AND UNPRECEDENTED DENIAL BY THE WASHINGTON SUPREME COURT OF ANY REMEDY TO A SUCCESSFUL LITIGANT

The State of Washington relies on *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932), *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073 (1983), and *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) to support its assertion that decisions of this Court have been applied "only prospectively to deny monetary relief to the litigant."[1] The State's characterization of the holdings in these cases is astounding. The cases do

[1]Appellee's Motion to Dismiss or Affirm ("Motion") at 9.

not stand for the State's proposition at all. In each case cited, prospectivity was either not applied or applied to preserve the individual's right to a remedy, and in fact each litigant's right to a remedy was preserved.

The District Court in *Norris* ordered a state agency to assure that future annuity payments to retired females would equal payments to similarly situated males.[2] The *Norris* case does not support the State's argument because:

1. This Court noted that when a court directs changes in benefits based on contributions made prior to its order "the Court [has] awarded relief that is fundamentally retroactive in nature."[3] It was abundantly clear to the dissent that retroactive relief had been granted.[4]

2. The *Norris* claimants were given a remedy: women were entitled to receive the same benefits as men.

In *Sunburst,* the Supreme Court declined to find any constitutional issues because no federally protected right was abrogated in the State of Montana's resolution of what type of common law it wanted to establish for its own purposes with respect to prospective application of rates.[5] The *Sunburst* case does not support the State's argument because:

1. The case did not involve the federal prospectivity question. The *Sunburst* case did not purport to give Montana the power to determine how the federal rule would apply in a given case. *Sunburst* preceded *Chevron* by almost forty years. The *Chevron* case lays down the applicable guidelines for determining applicability of the federal rule.

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[2]*Norris,* 463 U.S. at 1092.

[3]Id. at 1093. *Norris* was a class action. By its very nature, retroactive application of a class action is more likely to have inequitable results than is retrospective application of a single litigant's case, such as Tyler's, and therefore may justify non-retroactive treatment, yet notwithstanding this fact, the Court still gave effective retroactive treatment to the order.

[4]Id. at 1112.

[5]*Sunburst,* 287 U.S. at 361.

2. The *Sunburst* claimant was given a remedy: it recovered its excess rate payments.

One of the *Chevron* court's principal concerns with retroactive application was that "retroactive application of the Louisiana statute of limitations to this case would deprive the respondent of any remedy whatsoever . . . [T]o abruptly terminate this lawsuit that has proceeded through lengthy and, no doubt, costly discovery stages for a year would surely be inimical to the beneficent purpose of the Congress."[6] The *Chevron* case does not support the State's argument because:

1. The Court further held that decisions have been applied prospectively to protect property interests and to protect previous elections, and that "the respondent's potential redress for his allegedly serious injury . . . is entitled to similar protection." Although *Chevron* applied part of a Supreme Court decision prospectively, the rationale of the Court in protecting the remedy of the allegedly injured party supports Tyler's, not Washington Supreme Court's, argument here. The *Chevron* court did not apply "pure prospectivity" to the landmark decision and specifically noted that its holding only limited denial of retroactive effect to the statute of limitations as applicable under the prior case.[7]

2. The *Chevron* claimant's right to a remedy was preserved.

Though the State of Washington repeatedly urges that the Washington Supreme Court "carefully evaluated" the *Chevron* factors[8], and repeatedly cites that court's opinion in support of the alleged careful evaluation, the issue is not whether the Washington Court "carefully evaluated" the *Chevron* factors, but whether it correctly applied them in this case, which it did not. The circuit courts have split in their interpretation of the *Chevron* test. Some have applied the "reliance factor" as a threshold test for prospectivity, while others have required balancing of all three

[6]*Chevron*, 404 U.S. at 109.

[7]Id.

[8]Motion at 8.

factors. Recently, some courts have required that all three *Chevron* factors independently favor prospectivity before it can be applied.[9] Such disparate treatment of civil litigants alone suggests that this Court resolve the prospectivity issue.

The Constitution limits a government's ability to intrude upon an individual's rights. These decisions of this Court interpreting the Constitution, *supra,* consistently protect the individual's rights from government intrusion. By objecting to review of this case, the Washington Supreme Court would have this Court permit it to protect state government from taxpayers seeking to enforce their constitutional rights. Neither the Constitution, *Chevron, Norris,* nor *Sunburst* sanction that, and the State has failed to attach its position to those authorities.

## II.

## RESPONDENT NEVER ADDRESSES TYLER'S PRINCIPAL CONTENTION: DENIAL OF A REMEDY IS DENIAL OF DUE PROCESS.

The Washington Supreme Court has denied Tyler a remedy.

Tyler contends that denial of a remedy is denial of due process, for there is no value to a court procedure without a remedy. The Washington Supreme Court says that a taxpayer has an incentive to litigate "to avoid future tax liability." This belies common sense. What taxpayer, when advised by counsel that a tax is un-

[9] *Cash v. Califano,* 621 F.2d 626 (4th Cir. 1980); *Occhino v. United States,* 686 F.2d 1302 (8th Cir. 1982); *Jordan v. Weaver,* 472 F.2d 985 (7th Cir. 1973); *Cochran v. Birkel,* 651 F.2d 1219 (6th Cir. 1981) *cert. denied,* 454 U.S. 1152 (1982); Tatarowicz, *Right to a Refund for Unconstitutionally Discriminatory State Taxes and Other Controversial State Tax Issues Under the Commerce Clause,* 41 Tax Lawyer 103, 138-141 (1987).

constitutional, but there is no remedy, will proceed? The State's only response to the Washington Court's removal of any incentive for taxpayers to challenge unconstitutional taxes is the tangential observation that there has been no appreciable drop in litigation since the Court's decision in *Sunburst.*[10] An observation of such questionable relevance highlights how the State of Washington will tax this Court's credulity to attempt to justify the abrogation of Tyler's constitutional rights. The State assumes that taxpayers are and should be willing to subject themselves to unconstitutional discriminatory treatment in order perhaps to obtain some kind of future lawful treatment. This Court has not interpreted the commerce clause and the due process clause to require a taxpayer to be willing to make this sacrifice in order to avail itself of rights protected by the Constitution.[11] If the State is permitted to flout the Constitution by violating constitutional rights of taxpayers not once but *twice,* recognizing no limitations on its power to do so, then each state will have every incentive to create its own version of "due process."

This case is ripe for review. If allowed to stand, the Washington Supreme Court's decision will stop, or at least substantially discourage, future litigants from challenging states' unconstitutional actions.

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[10]Motion at 17.

[11]The State's whole argument is somewhat ingenuous in light of the State's enactment of legislation to deny Tyler and other taxpayers any future recovery as well.

## CONCLUSION

For the foregoing reasons, the Court should deny the State of Washington's Motion to Dismiss or Affirm and should note probable jurisdiction of this appeal or, in the alternative, grant a writ of certiorari.

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## CERTIFICATE OF SERVICE

It is hereby certified that service of the foregoing Reply to Motion to Dismiss or Affirm was made this 31st day of May, 1988, upon all parties required to be served by depositing three copies thereof in the United States Mail, first class postage prepaid, addressed:

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